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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 170808738-7777-01]

RIN 0648-BH11

Magnuson-Stevens Fishery Conservation and Management Act Provisions;

Fisheries of the Northeastern United States; Northeast Groundfish Fishery; Fishing Year 2017; Emergency Removal of Southern Windowpane Accountability Measures

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Temporary rule; emergency action; request for comments.

SUMMARY: This emergency rule removes the 2017 southern windowpane flounder accountability measures for non-groundfish trawl vessels that were triggered as a result of a 2015 quota overage. The rule is necessary because new information indicates 2016 catch did not exceed the quota. This rule is intended to mitigate negative economic impacts to non-groundfish vessels, while maintaining conservation benefits for the southern windowpane flounder stock.

DATES: Effective September 1, 2017, through February 28, 2018. Comments must be submitted by October 2, 2017.

ADDRESSES: You may submit comments, identified by NOAA-NMFS-2017-0105 by any of the following methods:

- *Electronic submissions:* Submit all electronic public comments via the Federal eRulemaking Portal. Go to www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2017-0105, click the “Comment Now!” icon, complete the required fields, and enter or attach your comments.
- *Mail:* Submit written comments to John K. Bullard, Regional Administrator, National Marine Fisheries Service, 55 Great Republic Drive, Gloucester, MA 01930. Mark the outside of the envelope, “Comments on the Windowpane Emergency Action.”

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on www.regulations.gov without change. All personal identifying information (*e.g.*, name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter "N/A" in the required fields if you wish to remain anonymous).

FOR FURTHER INFORMATION CONTACT: Aja Szumylo, Fishery Policy Analyst, phone: 978-281-9195.

SUPPLEMENTARY INFORMATION:

On August 1, 2017, we implemented accountability measures (AMs) in response to an overage of the 2015 southern windowpane flounder annual catch limit (ACL) (82 FR 35660). Due to data availability, AMs for windowpane flounder are typically implemented at the start of the second fishing year after an overage. The AMs require

trawl vessels fishing in certain areas in southern New England to use selective trawl gear that limit flatfish catch. The southern windowpane AM areas apply to all groundfish trawl vessels. The AM areas also apply to non-groundfish trawl vessels fishing with a codend mesh size of 5 inches (12.7 cm) or greater, which includes vessels that target summer flounder, scup, black sea bass, and skates. The AMs have been triggered for groundfish vessels in previous years, but this is the first year the AMs have been triggered for both groundfish and non-groundfish trawl vessels. These AMs are estimated to result in \$2 million in lost revenue in catch of yellowtail flounder, winter flounder, summer flounder, and scup. The AMs impose a substantial financial hardship on both groundfish and non-groundfish vessels, particularly because the AM areas eliminate access to target species that vessels are unlikely to recoup even if they move to fish in other areas.

In 2015, the New England Fishery Management Council developed Framework Adjustment 52 to the Northeast Multispecies Fishery Management Plan (FMP) to reduce the economic impacts of the windowpane flounder AMs for the groundfish fishery. At the time, the AMs were triggered only for the groundfish fishery. The Council intentionally limited the scope of Framework 52 to the groundfish fishery to ensure the action could be completed, and final measures implemented, in time for the start of the 2015 fishing year. Framework 52 included a provision that gave the Regional Administrator authority to remove the windowpane flounder AM in-season if catch is below the ACL in the year immediately following the overage. Thus, although we implemented an AM in 2017 due to an overage in 2015, we can remove the AM in September if catch did not exceed the ACL in 2016, the intervening year.

Southern windowpane flounder catch data for 2016 recently became available showing total 2016 catch was 82 percent of the total ACL, and catch by non-groundfish vessels was well below the sub-ACL for this fishery component. Following our announcement of the 2015 windowpane flounder overage and resulting 2017 AMs, the New England and Mid-Atlantic Councils both requested that we consider all remediation methods available to remove or modify the southern windowpane flounder AMs for 2017. The Councils highlighted the economic impacts of the AMs, as well as the status of the stock, which is rebuilt with overfishing not occurring. Additionally, possession of southern windowpane flounder has been prohibited for all fisheries since 2010. Given all of these factors, the Councils argued that the AMs are unnecessary and punitive. As a result, consistent with existing regulatory authority, we removed the AMs for the groundfish fishery effective September 1, 2017 (82 FR 35676; August 1, 2017). However, the regulatory authority to remove the southern windowpane flounder AM areas during the fishing year is limited to the groundfish fishery only, and the Regional Administrator currently is not authorized to remove the AM areas for non-groundfish trawl vessels. Without this emergency action, the AMs for non-groundfish vessels would remain in place for the entire 2017 fishing year, through April 30, 2018.

The New England Council, with support from the Mid-Atlantic Council, intends to address the AMs for non-groundfish trawl vessels in Framework 57 to the Northeast Multispecies FMP, which is scheduled to be implemented for the 2018 fishing year. However, neither Council is able to take action in time to address this issue for the 2017 fishing year in order to minimize the adverse economic impact of the 2017 AMs on the non-groundfish fishery.

Justification for Emergency Action

Section 305(c) of the Magnuson-Stevens Act (16 U.S.C. 1855(c)) authorizes the Secretary of Commerce to implement emergency regulations to address fishery emergencies. NMFS policy guidelines for the use of emergency rules define criteria for determining whether an emergency exists under section 305(c) of the Magnuson-Stevens Act (62 FR 44421; August 21, 1997). These criteria limit emergency management actions to “recent, unforeseen events or recently discovered circumstances” that present serious management problems in the fishery when emergency regulations would bring immediate benefits that outweigh the value of advance notice and public comment.

Maintaining the AMs on the non-groundfish fishery for the full fishing year would have immediate serious economic impacts without further contributing to the conservation goals of the AMs. Additionally, maintaining the AMs on the non-groundfish fishery presents a fairness and equity issue that was not previously apparent. The 2017 fishing year is the first time that we have been required to implement these AMs for both the groundfish and non-groundfish fisheries. Data supporting this removal only recently became available, and it is the first time that these AMs can be removed from the groundfish fishery but not the non-groundfish fishery. Before this, neither we, nor the Council, could have reasonably considered or foreseen the specific circumstance presented by the current situation, that is, the possibility of the AMs being removed for groundfish vessels but remaining in place for the non-groundfish trawl vessels, despite catch being below the ACL.

AMs are intended to correct operational issues that cause overages and mitigate biological consequences of overages. The fishery’s 2016 catch results demonstrate that

the fishery appears to have corrected the operational issues that caused the 2015 overage. The windowpane flounder AMs act as a disincentive to exceed an ACL and, if an overage does occur, the possibility of removing that AM during a fishing year is intended to provide an additional incentive to change fishing behavior in the year following an overage. Consistent with this incentive, the fishery's 2016 catch was below the ACL following the 2015 overage despite there being no AM areas in effect in 2016. In addition to the AM measures operating as expected, there were changes in the groundfish and non-groundfish fisheries that contributed to limiting 2016 catch below both the non-groundfish fishery sub-ACL and the total ACL. Catch limits for several Southern New England groundfish stocks and summer flounder were reduced in 2016 relative to 2015, which limited overall fishing effort targeting flatfish stocks in 2016. These catch limit reductions are also in place for the 2017 fishing year, so we expect southern windowpane flounder catch in 2017 to be similar to catch in 2016.

Current stock status and our environmental analyses confirm that the 2015 overage has not resulted in negative biological consequences for southern windowpane flounder. The 2015 assessment update for southern windowpane flounder stock found that the stock is not overfished and that overfishing is not occurring. The stock was declared rebuilt in 2012, and overfishing has not occurred on this stock since 2006. NMFS trawl survey indices indicate that stock size has been relatively stable, has been increasing since hitting a time series low in the mid-1990s, and has increased marginally between 2014 and 2016. This stock history shows that maintaining the AMs is not expected to provide substantial additional mitigation of potential adverse biological impacts.

The analysis in recent Northeast Multispecies FMP actions also shows that removing the AMs for non-groundfish vessels should not result in negative impacts for the southern windowpane flounder stock. Framework 52 addressed the biological impacts of removing the AMs in terms of the overall southern windowpane flounder ACL, and does not differentiate between sub-ACLs for different fisheries, or catch by different gear types. Further, available data suggest that removing the AMs for non-groundfish trawl vessels will not have biological impacts different than those analyzed in Framework 55, which set the total southern windowpane flounder ACL for fishing year 2017. Given the current operation of the groundfish and non-groundfish fisheries, and the status of southern windowpane flounder stock, leaving the AMs in place for non-groundfish vessels is expected to result in serious direct economic loss to vessels targeting summer flounder inside the AM areas without contributing further to the goals of the AMs.

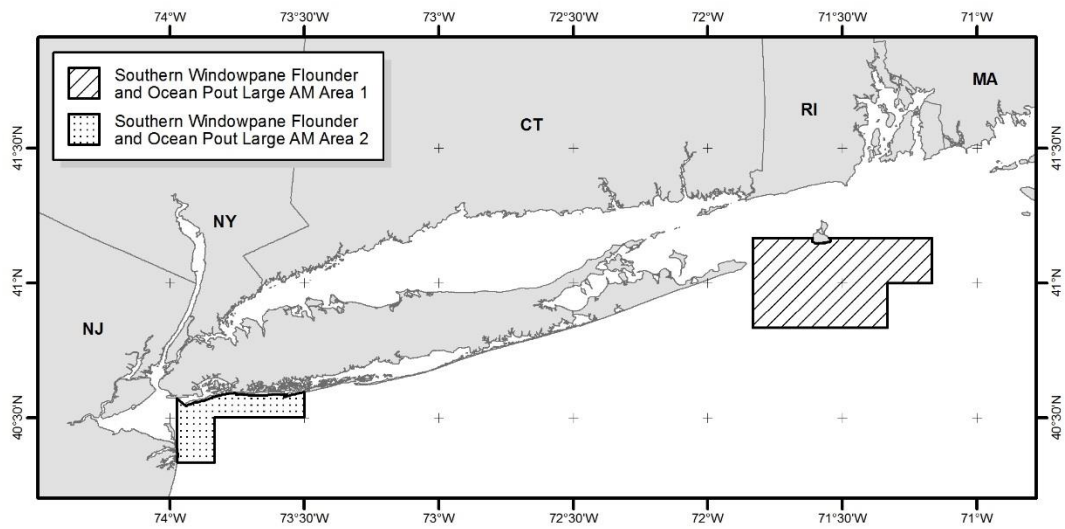
Acting quickly to remove the AMs on the summer flounder is particularly important because a greater portion of the summer flounder fishery catch occurs in the summer months through September. Yet, no additional AM goal is accomplished through maintaining the AMs on that fishery after August 31. We have determined that removing the AMs as soon as practicable after August 31 this fishing year through an emergency action is necessary and outweighs the benefits of using the advance notice and comment procedures. In developing any new measures through Framework 57, the Council process will provide ample opportunity for notice and comment and full participation. Consequently, the opportunity for notice and comment is only delayed. In addition, avoiding the serious economic loss for a reasonably unforeseen event, while

acting consistently with the conservation and management goals of the AMs, outweighs the benefit of advance notice and comment.

Emergency Measures

This emergency action extends to non-groundfish vessels the existing provision that already allows us to remove the southern windowpane flounder AM in September for groundfish vessels, if we determine that catch remained below the ACL in the year immediately following an overage. Effective September 1, 2017, this action temporarily removes (for 180 days) the southern windowpane flounder AMs for non-groundfish trawl vessels fishing with a codend mesh size of 5 inches (12.7 cm) or greater. Non-groundfish trawl vessels will be able to fish inside of the large southern windowpane flounder AM areas (Figure 1) without selective gear, which increases fishing opportunities to target other flatfish species for which they hold a permit and for which quota is available.

Figure 1. Southern Windowpane Flounder Accountability Measure Areas



Renewal of Emergency Regulations

The Magnuson-Stevens Act limits NMFS' emergency action authority to an initial period of 180 days, with a potential extension up to an additional 186 days, if warranted. The public has an opportunity to comment on the initial emergency action (see **ADDRESSES**). After considering public comments on this emergency rule, NMFS may extend the emergency regulation for one additional period of not more than 186 days to provide non-groundfish trawl vessels access to the AM areas without the use of selective trawl gear for the remainder of the 2017 fishing year, through April 30, 2018.

Classification

The NMFS Assistant Administrator has determined that this emergency rule is consistent with the criteria and justifications for use of emergency measures in section 305(c) of the Magnuson-Stevens Act, and is consistent with the Northeast Multispecies FMP, other provisions of the Magnuson-Stevens Act, the Administrative Procedure Act (APA), and other applicable law.

Section 553 of the APA establishes procedural requirements applicable to rulemaking by Federal agencies. The purpose of these requirements is to ensure public access to the Federal rulemaking process and to give the public adequate notice and opportunity for comment. Pursuant to 5 U.S.C. 553(b)(B), the Assistant Administrator for Fisheries finds good cause to waive prior notice and the opportunity for public comment because it would be impracticable and contrary to the public interest. Additionally, this rule is excepted from the 30-day delayed effectiveness provision of the APA under 5 U.S.C. 553(d)(1) because it relieves a restriction by removing the southern windowpane flounder AM areas for non-groundfish trawl vessels.

This is the first year the AMs have been triggered for both groundfish and non-groundfish trawl vessels, and it is also the first time we are removing the AMs for groundfish vessels under existing regulatory authority. Without additional action, the AMs for non-groundfish vessels would remain in place for the entire 2017 fishing year, through April 30, 2018. Maintaining the AMs on the non-groundfish fishery presents fairness, equity, and conservation issues that were not previously apparent, as neither we nor the Council considered or foresaw the possibility of the AMs being removed for groundfish vessels but remaining in place for the non-groundfish trawl vessels, despite total catch being below the ACL. The Council intends to address this issue in Framework 57, which is scheduled for implementation for the 2018 fishing year. However, the Council cannot develop Framework 57 in time to address this issue and/or remove the AMs on the non-groundfish fishery this fishing year.

Maintaining the AMs on the non-groundfish fishery for the full fishing year would have immediate serious economic impacts without contributing further to the conservation goals of the AMs. If the AM areas are in place for the full fishing year, they are estimated to result in \$2 million in lost revenue in catch of yellowtail flounder, winter flounder, summer flounder, and scup. The AM areas do not prohibit all fishing with bottom-tending trawls, but require the use of trawl gear designed to minimize flatfish catch, which eliminates access to target species that vessels cannot recoup even if fishing in other areas. Removing the AMs this fishing year through an emergency action mitigates serious economic harm to the non-groundfish fishery while the Council develops permanent FMP measures.

For all of the reasons outlined above, NMFS finds it impracticable and contrary to the public interest to provide prior opportunity to comment on these emergency measures. Because this rule alleviates a restriction, which if continued would otherwise have serious and unnecessary economic harm on non-groundfish trawl vessels, it is not subject to the 30-day delayed effectiveness provision of the APA. Prior notice and opportunity for public comment and/or a 30-day delayed effectiveness would prevent the positive benefits that this rule is intended to provide, particularly because the fisheries most affected by the AM areas are most active in the summer months through September.

This action is being taken pursuant to the emergency provision of the Magnuson-Stevens Act and is exempt from OMB review.

This emergency rule does not contain policies with Federalism or “takings” implications as those terms are defined in E.O. 13132 and E.O. 12630, respectively.

This emergency rule is exempt from the procedures of the Regulatory Flexibility Act because the rule is issued without opportunity for prior notice and opportunity for public comment.

List of Subjects in 50 CFR Part 648

Fisheries, Fishing, Recordkeeping and reporting requirements.

Dated: August 28, 2017.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs,

National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 648 is amended as follows:

PART 648--FISHERIES OF THE NORTHEASTERN UNITED STATES

1. The authority citation for part 648 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.*

2. In § 648.90, add paragraph (a)(5)(i)(D)(I)(iii) effective September 1, 2017 through February 28, 2018.

The addition reads as follows:

§ 648.90 NE multispecies assessment, framework procedures and specifications, and flexible area action system.

(a) * * *

(5) * * *

(i) * * *

(D) * * *

(I) * * *

(iii) *Emergency rule reducing the duration of southern windowpane flounder AM for non-groundfish vessels.* Effective September 1, 2017 through February 28, 2018, the southern windowpane flounder AM is removed for all vessels fishing with trawl gear with a codend mesh size equal to or greater than 5 inches (12.7 cm) in other, non-specified sub-components of the fishery, including, but not limited to, exempted fisheries that occur in Federal waters and fisheries harvesting exempted species specified in § 648.80(b)(3).

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